LIBRARY
SUPREME COURT, U.S.
LIBRARY
SUPREME COURT, U.S.

No. — 263

Office - Supreme Court, U. S.
FILED
AUG 6 1954
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	8
Conclusion	21
Appendix A	1a
Appendix B	34a

CITATIONS

Cases:

Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U. S. 752 14-15

Armstrong v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, certiorari denied, 343 U.S. 967 ..... 9, 19

Blanchard Mach. Co. v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912 ..... 9, 10, 19

Eastern Machinery Co. v. *Under Secretary of War*, 182 F. 2d 99 20

French v. *War Contracts Price Adjustment Board*, 182 F. 2d 560 9

Gale, Robert I., et al., Estate of v. *United States of America*, C.A. D.C. No. 11906 11

Hanlon-Waters Inc. v. *United States*, C.A.D.C. No. 11934 11

Lichter v. *United States*, 334 U.S. 742 ..... 14, 15-16

Lichter, Jacob, et al. v. *United States of America et al.*, C.A. D.C. No. 11925 11

Lowell Wool By-Products Co. v. *War Contracts Price Adjustment Board*, 192 F. 2d 405 ..... 9, 17-18

Macauley v. *Waterman S. S. Corp.*, 327 U.S. 540, 3, 5, 7, 12-14, 16

Ring Construction Corp. v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U.S. 943 ..... 9, 19

Cases—Continued

	Page
State of New York, Ex parte, 256 U.S. 503	6
United States v. *Martin Wunderlich Co.*, 211 F. 2d 433	16
U. S. Electrical Motors, Inc. v. *Jones*, 153 F. 2d 134	9, 17
Warner v. *War Contracts Price Adjustment Board*, 188 F. 2d 363	9
Western Pacific Railroad Corp. v. *Western Pacific Railroad Co.*, 345 U.S. 247	12

Statutes:

International Revenue Code, Sec. 1141, 26 U.S.C. 1141	6
Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U.S.C. App. 1191 *et seq.*)	4
Section 403(a)	5
Section (a)(1)	34a
Section 403(a)(5)(B)	34a
Section 403(c)(6)	18, 35a
Section 403(e)	36a
Section 403(e)(1)	9, 36a
Section 403(e)(2)	5, 37a
Renegotiation Act of March 23, 1951 (65 Stat. 7, 21-22, 50 U.S.C. App. 1218:	
Section 108	20
Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 46 U.S.C. 1111, note	6
28 U.S.C. 2101(c)	12

Miscellaneous:

99 Cong. Rec. 9523	20
100 Cong. Rec. 62, 65 (unbound ed.)	21
Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 433, 443-444	17
H. Doc. 251, 83rd Cong., 2d Sess.	21
H. R. 6287, 83rd Cong.	20
H. Rep. No. 860, 83rd Cong., 1st Sess.	20
S. Rep. No. 643, 83rd Cong., 1st Sess.	21
Stephens, *Shop Talk Concerning the Business of the Court*, 20 D.C. Bar Association Journal 103, 105-109	11

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States and the Secretary of Commerce, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on January 21, 1954.

OPINIONS BELOW

The opinion of the Court of Appeals deferring action on the jurisdictional question (App. A. 4a-16a) is reported at 204 F. 2d 398; its subsequent

opinion holding that it lacked jurisdiction (App. A. 21a-29a) is reported at 211 F. 2d 635. The opinion of the Tax Court (R. 278-302) is reported at 17 T. C. 1325.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1954 (App. A. 30a). The timely motion of the United States and the Secretary of Commerce for rehearing *en banc* was denied on March 12, 1954 (App. A. 31a-33a). By order of the Chief Justice, dated May 29, 1954, the time for filing a petition for a writ of certiorari was extended to and including August 9, 1954 (App. A. 33a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether under the Renegotiation Act of 1942, as amended, the Court of Appeals for the District of Columbia Circuit has authority to review a determination by the Tax Court in a renegotiation case that a contract is not renegotiable because it was not made with the United States.

STATUTE INVOLVED

The pertinent provisions of the Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U.S.C. App. 1191 *et seq*) are set forth in Appendix B, *infra*, pp. 34a-38a.

STATEMENT

The facts pertinent to the issue here raised may be briefly summarized as follows:

During April and May of 1941, the Maritime Commission, at the request of the President and in an effort to coordinate shipping in the furtherance of the national defense effort, assembled 2,000,000 tons of merchant shipping (R. 234, 279). Because of the shortage of available ships, the Commission, in order to accomplish this task, assembled the required tonnage from intercoastal ships (R. 44). Included among the intercoastal ships so assembled was respondent's vessel, VERMONT (R. 44).

At that time, the British Government requested from the United States, under the Lend-Lease program, shipping facilities which it needed to transport war equipment and supplies for its North African campaign. Pursuant to this request, the President authorized the Maritime Commission to negotiate with various shipowners, including representatives of respondent, in order to secure the necessary tonnage for this operation.[1] After numerous conferences during April and May 1951, Commission officials and the shipowners worked out the terms under which the VERMONT and other vessels were to be chartered for the Red Sea operation, including the charter rates which the owners were to be paid.

During the course of the negotiations between the Commission officials and the shipowners, it was understood by all the negotiating parties, including

---

[1] This operation ultimately became known as the "Red Sea operation" because of the ultimate destination of the vessels. Cf. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 542.

respondent, that the British Government would probably be the formal charterer under the charters for this Red Sea operation (R. 284) and respondent's charter was actually signed by the British Ministry of War Transport (R. 24). Neither the British Government nor any of its agencies or representatives, however, took part in the negotiations with the shipowners on the terms of the charter of the VERMONT or the other ships for the Red Sea operation (R. 284) and the charter was not formally executed by a British Ministry of War Transport representative until after the sailing of the VERMONT for Port Sudan on May 29, 1941 (R. 284-285). The Commission paid all bills and other obligations which arose under this charter directly to the shipowners from funds appropriated by the Congress of the United States (R. 105, 135, 143, 151), and the British Government did no more than certify to the Commission that the charter services had been performed (R. 134, 142, 150).

Full performance under respondent's charter was not completed until after April 28, 1942, the date on which Congress enacted the Renegotiation Act, 56 Stat. 245; 50 U.S.C. App. 1191. In accordance with the terms of this Renegotiation Act, as amended, the Chairman of the United States Maritime Commission, on November 27, 1943, commenced renegotiation proceedings with respondent in an effort to eliminate the excessive profits which respondent had realized from its Red Sea venture (R. 51-53). On March 31, 1949, a unilateral rene-

gotiation order was issued determining that respondent had received $161,000 in excessive profits from its charter (R. 15-16).[2]

Respondent petitioned the Tax Court for redetermination of its excessive profits under Section 403(e)(2) of the Renegotiation Act, as amended, *infra,* pp. 37a-38a (R. 4-14). Thereafter, it moved the Tax Court to consider first, from among the various issues raised by its petition, the issue whether its Red Sea contract was subject to renegotiation. This issue turns on whether respondent's charter, although formally executed by the British Ministry of War Transport, was in fact with the Maritime Commission and so a renegotiable contract with a "Department" under Section 403(a) of the Renegotiation Act, as amended, *infra,* p. 34a. The Tax Court granted this motion (R. 38),[3] and after a hearing on this issue,[4] the court concluded,

---

[2] The delay in issuing this order was attributable, in some measure, to the institution of judicial proceedings by some of the shipowners, including respondent (R. 27), who sought to enjoin the administrative proceedings on the ground that the charters were not subject to renegotiation. This effort came to nought when this Court held that the failure to exhaust administrative remedies precluded judicial consideration of the issues attempted to be raised. *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540.

[3] As a result of this severance, no issue as to the amount of excessive profits was presented to the Tax Court; the questions presented were restricted to a consideration of the jurisdiction of the Maritime Commission and the Tax Court to subject respondent's Red Sea charter to renegotiation.

[4] The Tax Court excluded from evidence (R. 277, 297) an Official Statement of the British Government, which petitioners had received through official government and diplomatic channels, to the effect that when a representative of the British

one judge dissenting, that the charter was with the British Ministry of War Transport and not with the Commission, and therefore was not subject to renegotiation under the Act (R. 278-302).

Relying on prior decisions of the District of Columbia Court of Appeals (see *infra*, pp. 9, 16-20), the Government filed a petition in that court (under Section 1141 of the Internal Revenue Code, 26 U.S.C. 1141) for review of the Tax Court's determination that respondent's Red Sea charter was not renegotiable (R. 302-305). Respondent moved to dismiss the petition on the ground that the court was without jurisdiction to pass on this issue (App. A. 2a). After hearing argument on this motion, the court deferred decision thereon until the hearing on the merits (App. A. 16a, 17a).[5] After further argument, the panel of the court sitting on the case

---

Government executed the charter it was understood "that His Majesty's Government in signing said charters were agents only and that the principal and real party in interest was the United States Government as represented by the United States Maritime Commission" (R. 272). This ruling appears to be contrary to *Ex parte State of New York*, 256 U.S. 503, and other persuasive rulings.

[5] The court simultaneously denied the Government's motion to remand the cause to the Tax Court with instructions to vacate its decision on the ground that since Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 46 U.S.C. 1111, note) had abolished the position of the Chairman of the Maritime Commission, the named respondent in the Tax Court and had transferred his functions to the Secretary of Commerce, the proceeding had abated with respondent's failure to make timely substitution (App. A. 1a, 3a-17a). However, the court went on to rule that, since the Secretary of Commerce had failed to appear in the proceeding before it, there might be an absence of proper parties, and allowed time for him to appear (App. A. 11a-16a, 17a). In accordance with this ruling, the

(Clark, Prettyman and Washington, J. J.) held that it lacked jurisdiction to pass on the question. Quoting from this Court's opinion in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544[6] the opinion, written by Judge Prettyman, concluded (App. A. 27a):

> The problem now before us is precisely the problem involved in that discussion. The

---

Government moved to substitute the present petitioners for the Chairman of the Maritime Commission, which motion was granted (App. A. 18a-21a).

[6] The *Waterman* language quoted by Judge Prettyman is as follows (see App. A. 25a-26a):

> Just as in the *Myers case* [303 U.S. 41], the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403 (c) (1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . ." Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act.

> Court said without qualification that what are and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this court has no jurisdiction to review the decision of the Tax Court upon the question whether the contract in controversy was or was not renegotiable.

Petitioners' petition for rehearing by the Court of Appeals in banc was denied (App. A. 32a-33a).

REASONS FOR GRANTING THE WRIT

The crux of this case is that one panel of the Court of Appeals for the District of Columbia Circuit has denied the Government review of an adverse Tax Court renegotiation ruling—on the ground that the ruling pertained to "coverage" rather than "jurisdiction", and was therefore unreviewable—while other panels of the same court have in the past and will apparently continue to entertain contractors' appeals on similar issues as raising questions of "jurisdiction" rather than "coverage". All appropriate avenues of relief within the Court of Appeals have been exhausted, and only this Court can now afford a remedy. Since the matter is important, involving the renegotiability of the well-known "Red Sea charters",[7] we feel warranted in invoking the Court's super-

[7] There are twelve other "Red Sea charter" cases pending in the Tax Court. See, *infra*, p. 21.

visory authority to untangle the judicial net in which the Government finds itself enmeshed.

1. The District of Columbia Circuit has, over the Government's initial opposition, repeatedly insisted that it has power to review Tax Court renegotiation decisions on constitutional and "jurisdictional" grounds. *E. g., U. S. Electrical Motors, Inc.* v. *Jones,* 153 F. 2d 134; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board,* 192 F. 2d 405; *Armstrong* v. *War Contracts Price Adjustment Board,* 194 F. 2d 875, certiorari denied, 343 U. S. 967; *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board,* 177 F. 2d 727, certiorari denied, 339 U. S. 912; *Ring Construction Corp.* v. *Secretary of War,* 178 F. 2d 714, certiorari denied, 339 U. S. 943; see the Memorandum for Respondent in Opposition, *Martin Wunderlich Co.* v. *Secretary of War,* No. 666, Oct. Term, 1952; see, also, *infra,* pp. 16-20. Since the great bulk of the decisions in this field are by the District of Columbia Court of Appeals,[8] and the law in that court had become so firmly established by frequent reiteration and application, the Government sought review of the Tax

[8] The exceptions are two Ninth Circuit decisions (*French* v. *War Contracts Price Adjustment Board,* 182 F. 2d 560, and *Warner* v. *War Contracts Price Adjustment Board,* 188 F. 2d 363), in which that Court of Appeals held that 403(c)(1) of the Renegotiation Act, as amended, *infra,* pp. 36a-37a, foreclosed appellate review of Tax Court decisions. However, that court seems to suggest that Tax Court determinations may be collaterally attacked on grounds similar to those recognized by the District of Columbia Court of Appeals, in the district court suits brought by the Government to recapture the excessive profits.

Court's determination that the Red Sea charters were not renegotiable. As we show in detail below (*infra*, pp. 16-20), the appellate court's previous rulings on comparable issues justified the Government in believing that the issue was "jurisdictional" and therefore reviewable.

Nevertheless, in this instance—the first in which the Government has invoked the court's asserted jurisdiction—the three-judge panel hearing the case departed from the court's heretofore consistent position by holding that the renegotiability *vel non* of the charters is a question of "coverage" within the non-reviewable jurisdiction of the Tax Court. The result is an unequal application of the law which precludes appellate scrutiny of the most important decision against the Government rendered by the Tax Court under the Renegotiation Act.[9]

The sense of disparate treatment is heightened by the fact that this panel's limited view of the scope of reviewability of Tax Court determination does not appear to be shared, even now, by

---

[9] It is also worthy of note that in *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, the only other renegotiation appeal by the Government which is pending in that court, the District of Columbia Circuit, after first holding that it had power to review (see 345 U.S. 950), later held that the issue of timely commencement of renegotiation is non-jurisdictional and not reviewable. The court expressly overruled that phase of its decision in *Blanchard Machine Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912, in which it had held, on a contractor's appeal, that the issue was jurisdictional and reviewable.

a number of the other judges comprising the District of Columbia Court of Appeals.[10] Not only was a broader review accorded to the contractors in the court's prior decisions (*infra*, pp. 16-20)—decisions which the instant panel does not undertake expressly to overrule—but subsequent to the decision here other panels, considering three other Tax Court renegotiation cases (appealed by the contractors) involving similar issues of contract renegotiability, expressed strong doubts, in oral argument, as to the correctness of the result in this case and indicated that they might well reach a conflicting conclusion on that issue. *Estate of Robert I. Gale et al.* v. *United States of America*, C. A. D. C. No. 11906 (argued April 14, 1954, before Edgerton, Miller, and Bazelon, JJ.); *Hanlon-Waters, Inc.* v. *United States*, C. A. D. C. No. 11934 (argued May 12, 1954, before Miller, Bazelon, and Fahy, JJ.); *Jacob Lichter, et al.* v. *United States of America, et al.*, C. A. D. C. No. 11925 (argued May 12, 1954, before Miller, Bazelon, and Fahy, JJ.).

To await, if possible, the decisions in those cases and the development of this potential intra-circuit conflict, the Government sought an extension of time for filing a petition for a writ of certiorari in this case until August 9, 1954, the maximum of sixty

---

[10] Although the Government's petition for rehearing *en banc* was denied, the District of Columbia Court of Appeals frequently denies such petitions for reasons other than the correctness of the decision. Cf. Stephens, *Shop Talk Concerning the Business of the Court*, 20 D.C. Bar Association Journal 103, 105-109.

days permitted by 28 U. S. C. 2101(c).[11] However, no decision has yet been issued in any of these subsequently argued cases. Since no further extension of time is permissible, the only practical way open to the Government to insure equality of treatment under the rules prevailing in the District of Columbia Court of Appeals is through review by this Court.

2. Moreover, the opinion below misapplies this Court's language in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544. As noted, *supra*, pp. 7-8, the court reads the *Waterman* language as holding in effect that a determination by the Tax Court as to the renegotiability of a contract is non-reviewable. But when read in context and in conjunction with later decisions of this Court, the *Waterman* opinion plainly does not pass upon this question and consequently does not support the conclusion below, much less require it. Indeed, far from passing upon the issue, this Court has gone out of its way in its decisions expressly to reserve the question.

The *Waterman* case did not involve an attempted review of a Tax Court decision; the administrative proceedings which are necessary preliminaries to

---

[11] In view of these circumstances, the Court may deem it appropriate to withhold action upon this petition until the issuance of opinions in one or more of the three pending cases. Should an intra-circuit conflict formally develop, the Court may wish to remand the case to the court below for an *en banc* resolution of the conflict. Cf. *Western Pacific Railroad Corp* v. *Western Pacific Railroad Co.*, 345 U.S. 247, 270 (opinion of Mr. Justice Frankfurter), 274 (dissenting opinion of Mr. Justice Jackson).

instituting suit in the Tax Court had not even been completed. The purpose of the district court action brought by the shipowner in that case was to obtain (1) a declaratory judgment that his Red Sea charters, similar to the present charter, were not renegotiable and (2) an injunction prohibiting the continuation of the administrative proceedings. As a result, the sole issue before this Court was whether the district court has jurisdiction to grant the relief prior to the termination of the administrative proceeding. In holding that the district court lacked jurisdiction, this Court declared (327 U. S. at 544-5), immediately following the excerpt quoted by the court below (App. A, *infra*, pp. 25a-26a):

> * * * In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the *Myers* case [*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41], the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act.

Thus, this Court's reference, stressed in the opinion below, to questions of coverage being within the exclusive jurisdiction of the Tax Court was con-

cerned solely with delineating the matters committed to the original jurisdiction of the Tax Court to the exclusion of the district courts, and was not intended to treat the scope of review once the Tax Court had made its determination. The fundamental error in the opinion below is its reading of "exclusive", as used in *Waterman*, as necessarily synonymous with "unreviewable".

That this Court in *Waterman* intended to pass only on the jurisdiction of a district court to grant relief prior to the termination of the administrative proceedings, and not on the scope of review of Tax Court determinations, is further demonstrated by the Court's subsequent decisions in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, and *Lichter* v. *United States*, 334 U. S. 742, decisions which the opinion below completely overlooks. *Aircraft & Diesel*, like *Waterman*, involved a district court suit by a contractor seeking a declaratory judgment and injunction but in circumstances where the administrative proceeding had been completed and a petition for redetermination was pending in the Tax Court. Again holding that the district courts were without jurisdiction to entertain such a suit, this Court, in addition to explaining the *Waterman* case as involving solely the principle of exhaustion of administrative remedies (331 U. S. at 755), expressly distinguished between the statutory provision conferring exclusive original jurisdiction upon the Tax Court (*vis a vis* the district courts) in renegotiation matters and the provision concerning the finality of Tax Court de-

cisions (331 U. S. at 768-769). As to the scope of the latter, the Court unequivocally stated (331 U. S. at 771):

> We do not express any opinion, indeed we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters.[12]

And in *Lichter*, where defendant contractors sought to resist the suits brought by the Government in the district court to recapture excessive profits as determined by the appropriate renegotiating agencies on the ground that such determinations were invalid, this Court, at the same time that it reaffirmed *Waterman* and *Aircraft & Diesel* by

---

[12] The Court's opinion goes on (331 U.S. at 771):

> We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition. For it seems obvious, in view of the Act's terms, history, objects and the policies incorporated, that Congress clearly and at the very least intended the Tax Court's functions not only to be put in motion but to be fully performed, before judicial intervention should take place at the instance of one in appellant's position.
>
> This indeed was the ruling of the *Waterman* case. And we do not think the effect of that ruling is exhausted simply because constitutional questions were not raised there, but have been put forward in this cause. Nor is it overcome, in our judgment, by the showing which has been made on this record of irreparable injury and of the need as well as the power of equity to forestall the complete operation of the congressionally prescribed procedure.

sustaining the exclusiveness of the Tax Court remedy, again distinguished the question of the finality of such Tax Court decisions and explicitly noted that it was not passing on that issue (334 U. S. at 791):

> No petitions were filed with the Tax Court in any of the cases before us, and the time for doing so has expired. Accordingly, here, as in *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771, we do not have before us, and we do not express an opinion upon, the finality which would have attached to a redetermination by the Tax Court if such a redetermination had been sought and made. We have only the situations presented by the respective failures of the petitioners to resort to the Tax Court in the face of the express statutory provisions made for such administrative relief.

It is thus plain that, contrary to the opinion below, this Court in *Waterman* and subsequent cases has merely affirmed the requirement of exhaustion of administrative remedies and has not defined the "finality" to be accorded Tax Court determinations. In these circumstances, the reading into *Waterman* by the panel below of a holding that a Tax Court determination as to contract renegotiability is non-reviewable is without justification.

3. The decision below similarly reflects a failure to appreciate the full impact of the prior rulings of the District of Columbia Court of Appeals. While the opinion recognizes that "[t]his court

has held several times that in renegotiation cases it can review decisions of the Tax Court in respect to jurisdictional and Constitutional questions only" (App. A, *infra*, p. 24a),[13] it overlooks the fact that in a number of these cases the court has also held that issues which are the same as, or comparable to, that here involved were "jurisdictional" and so reviewable. Cf. Davis, *Unreviewable Administrative Action*, 15 F. R. D. 411, 433, 443-444.

Thus, *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405, concerned the issue whether two companies were "un-

---

[13] The District of Columbia Court of Appeals has set out its rationale for exercising authority to review such questions in a number of cases. See, *e.g.*, *U. S. Electrical Motors Inc.* v. *Jones*, 153 F. 2d 134, 136-137; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405, 407; first opinion in instant case, App. A, *infra*, pp. 12a-14a. For example, in the *Electrical Motors* case, the court stated (153 F. 2d at 136-137):

> Respondents argue that the Renegotiation Act forbids judicial review of any act of the Tax Court in a renegotiation case. The Act does not so read. It very carefully says that the Tax Court shall have exclusive jurisdiction to determine the amount of excessive profits. It leaves untouched, by direct reference or otherwise, the remaining content of Section 1141(a) of the Internal Revenue Code. We think, therefore, that the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination, but that a ruling upon the jurisdiction of the Tax Court is untouched by that provision and, therefore, remains reviewable by this court. It would, we think, require clear language to indicate that Congress intended that any tribunal should have unreviewable authority to determine its own jurisdiction.

der common control" for the purpose of applying the $500,000 war-business floor provision of Section 403(c)(6) of the Renegotiation Act, *infra*, p. 35a. The Court of Appeals held that the issue was one of "jurisdiction", subject to review (192 F. 2d at 407):

> * * * it is enough to say that in our opinion the determination that petitioner and Nichols & Co., Inc., were under common control was a determination of jurisdiction. It is clear that the finding of common control was requisite to the right of the Board to renegotiate any profits of this petitioner Company.

Although the *Lowell Wool* opinion appears, by way of dictum, to regard "common control" as on a different plane for purposes of judicial review than the "question whether a certain contract is within those to be renegotiated" (192 F. 2d at 407), the distinction between the two concepts does not, under the rationale of *Lowell Wool* and other District of Columbia Circuit cases, justify a different result in the present case. A finding of contract renegotiability, like one of common control, is requisite to the agency's right to renegotiate any profits, particularly where, as here, the Government relies on only one contract with respondent to establish its right to recapture excessive profits.[14]

---

[14] It may be noted in passing that *Waterman* is discussed only in *Lowell Wool* and the instant case, although subsequent to *Waterman* the court below issued some 12 decisions on this general question. (Both the *Lowell Wool* and the instant opin-

And in the later case of *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875 (C. A. D. C.), certiorari denied, 343 U. S. 967, the court held "jurisdictional" the question whether a salesman receiving commissions on sales by steel companies under contracts or subcontracts with the Government was a "subcontractor" as defined in Section 403(a)(5)(B) of the Renegotiation Act, *infra*, p. 34a. We cannot distinguish the *Armstrong* case from the present problem of whether respondent was a contractor with the United States.[15]

The prior rulings of the court also accord with the view that it has competence to review issues of contract renegotiability. In *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714 (C.A. D.C.), certiorari denied, 339 U. S. 943, it held reviewable not only the constitutionality of the Renegotiation Act, as applied to contracts entered into prior to its enactment, but also the issue of whether such contracts were covered by the Act, *i.e.*, their renegotiability under the Act as a matter of statutory interpretation. See 178 F. 2d at 715. Similarly, in *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d

---

ions were written by Prettyman J., and Washington J. was one of the other members of the panel.) And while *Lowell Wool* seems to read *Waterman* as holding contract renegotiability to be an issue within the nonreviewable jurisdiction of the Tax Court, it also expressly recognizes that *Waterman* "rested upon failure to exhaust administrative remedies, and the Court, by one or two expressions, reserved decision upon the question of subsequent judicial review" (192 F. 2d at 407).

[15] The opinion below does not refer to the *Armstrong* case.

727 (C. A. D. C.), certiorari denied, 339 U. S. 912 and *Eastern Machinery Co. v. Under Secretary of War*, 182 F. 2d 99 (C. A. D. C.), the court reviewed as "jurisdictional" the renegotiability, under the 1943 amendment to the Act, of certain contracts with Reconstruction Finance Corporation subsidiaries completed prior to the amendment's enactment. One of the issues reviewed in each of these cases thus involved contract renegotiability, issues which are indistinguishable from that presented here.

4. In addition to curing the unfortunate position in which the Government finds itself in the court below, a ruling by this Court would establish uniform principles under which the more than 100 renegotiation cases still pending before the Tax Court under the Renegotiation Act of 1942, as amended, would be reviewable, if at all, by the courts of appeals. In this connection, it is also significant that although the Renegotiation Act of 1942, as amended, has expired, the pertinent provision of Section 403(e) has been re-enacted in Section 108 of the Renegotiation Act of March 23, 1951 (65 Stat. 7, 21-22, 50 U. S. C. App. 1218), the extension of which (H. R. 6287, 83d Cong.) is at this time awaiting Congressional action.[16] These considera-

---

[16] H. R. 6287 was passed by the House on July 22, 1953. 99 Cong. Rec. 9523; see also H. Rep. No. 860, 83rd Cong., 1st Sess. Subsequently, it was reported out favorably with amendments by the Senate Finance Committee (S. Rep. No. 643, 83rd Cong. 1st Sess.) and it is now on the Senate Consent Calendar awaiting to be called up for Senate consideration. Its passage

tions, plus the significant fact that the Tax Court's determination here will be dispositive for all practical purposes of the twelve additional Red Sea charter cases pending in the Tax Court and involving more than $7,000,000 in excessive profits,[17] indicate the appropriateness of review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

AUGUST, 1954.

---

was recommended strongly by President Eisenhower in the State of the Union Message, H. Doc. 251, 83rd Cong., 2d Sess.; 100 Cong. Rec. 62, 65 (unbound ed.).

[17] In all, there were 93 Red Sea voyages by 22 shipowners, of whom 7 voluntarily repaid excessive profits of more than $3,000,000. As to the remaining two shipowners, it was administratively determined that their profits had not been excessive.